

CLOSED

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

JOSHUA VEREB, Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

v.

THE GILLETTE COMPANY,

Defendant.

Civil Action No.: 05-CV-3673 (JLL)

ORDER

DAVID DELRE, Individually and On Behalf
of All Others Similarly Situated,

Plaintiffs,

v.

THE GILLETTE COMPANY,

Defendant.

Civil Action No.: 05-CV-3706 (JLL)

ORDER

This Court had referred Plaintiff's motion [3] to remand these consolidated civil actions back to the Superior Court of New Jersey, Law Division, Bergen County, to the Honorable Ronald J. Hedges, United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B). Having reviewed *de novo* the Report and Recommendation of October 5, 2005, and having considered Defendant's objections to the Report as well as Plaintiffs' response to Defendant's objections, this Court concludes that the action should be remanded to the Superior Court of New Jersey, Law Division, Bergen County as there was a procedural defect in the Defendant's removal. The attached Report

and Recommendation of the United States Magistrate Judge is adopted and incorporated as the Opinion of this Court.

IT IS on this 30th day of November, 2005,

ORDERED that the Report and Recommendation of Magistrate Judge Hedges filed October 5, 2005, recommending that these civil actions be remanded, is hereby ADOPTED as the findings of fact and conclusions of law of this Court; and it is further

ORDERED that Civil Action Nos. 05-CV-3673 and 05-CV-3706 are hereby remanded to the Superior Court of New Jersey, Law Division, Bergen County.

This case is CLOSED.

DATED: November 30, 2005

/s/ Jose L. Linares
JOSE L. LINARES,
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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WILLIAM J. HEDGES, CLERK

DELRE, : Civil Action No.05-3706 (JLL)
Plaintiff, :
v. : REPORT AND RECOMMENDATION
GILLETTE COMPANY, :
Defendant. :

INTRODUCTION

This matter having come before the Court on motions to remand these consolidated civil actions to the Superior Court of New Jersey; the Court having considered the papers submitted in support of and in opposition to the motion and having heard oral argument on September 12, 2005; for the reasons set forth in the attached transcript; good cause appearing;

IT IS ORDERED that the alternative relief sought by defendant Gillette Company to defer a ruling on the pending motion to remand is DENIED:

IT IS HEREBY RECOMMENDED that these consolidated civil actions be remanded.

Pursuant to Local Civil Rule 72.1(c)(2), the parties have ten (10) days from receipt of this Report and Recommendation to file and serve objections.

s/Ronald J. Hedges
RONALD J. HEDGES
UNITED STATES MAGISTRATE JUDGE

Attachment

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DELRE, : Civil Action No.
:
Plaintiff, :
: Newark, New Jersey
vs. :
:
GILLETTE COMPANY, :
:
Defendant. : Monday, September 12, 2005

TRANSCRIPT OF MOTIONS
BEFORE THE HONORABLE RONALD J. HEDGES, U.S.M.J.

APPEARANCES:

FOR THE PLAINTIFF:

BY: STEPHEN SOHMER, ESQ.
(Sohmer Law Firm, LLC)
1 Passaic Avenue
Fairfield, NJ 07004

BY: ANTHONY VOZZOLO, ESQ.
(Faruqi & Faruqi)
320 East 39th St, 3r floor
New York, NY 10016

FOR THE DEFENDANT:

BY: ROBERT BARTKUS, ESQ.
(Dillon, Bitar & Luther)
53 Maple Avenue
Morristown, NJ 07963

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

RAPID TRANSCRIPT SERVICE, INC.

BY: Diane Tillson
4 Elodie Lane

Randolph, New Jersey 07869
(973) 328-1730 FAX (973) 328-8016

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I N D E X
9/12/05

ARGUMENT

By Mr. Bartkus
By Mr. Vozzolo
By Mr. Bartkus
By Mr. Vozzolo

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8,14

COURT DECISION

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1 THE COURT: All right. Let's do Delre and --
2 what's the related case -- Vereb.

3 Your appearances, gentlemen.

4 MR. SOHMER: Good morning, Your Honor. Stephen
5 Sohmer and Anthony Vozzolo for the plaintiffs.

6 MR. BARTKUS: Good morning, Your Honor. Robert
7 Bartkus of Dillon, Bitar & Luther for the defendant, Gillette
8 Company.

9 THE COURT: Okay. As an initial matter,
10 gentlemen, I understand we have a motion to remand here. I
11 also understand that there's an alternative relief sought by
12 the defendant, which would defer a ruling on this motion until
13 the MDL had an opportunity to address this.

14 I appreciate the argument, Mr. Bartkus, but
15 whether or not the case is properly removed is something that
16 can easily be addressed here rather than await decisions by
17 other Courts that possibly will just create conflicts in
18 anything.

19 So, that part of the application is denied. Let's
20 proceed with the motion.

21 Let me hear from the plaintiff first.

22 MR. BARTKUS: Your Honor, could I just ask the
23 Court to look at the case cited by defendants, the Nekritz
24 (phonetic) case by Judge Debevoise, and that was a case in
25 which the parties moved to remand and also for a stay

1 concerning securities litigation.

2 The Court found that a stay was appropriate
3 because, in part, the plaintiff already had agreed to a
4 certain aspect of the stay and that the Court then denied the
5 motion for remand without prejudice because, as here, there
6 were other cases around the country raising similar issues
7 about jurisdiction under the Securities Act here, 1332.

8 and the Court found, Judge Debevoise found that it
9 was more appropriate for a single judge, once the case was
10 consolidated in the MDL proceedings, to decide all of those
11 issues in all of those cases at once rather than having
12 different decisions in different Courts around the country.

13 THE COURT: I appreciate that, Mr. Bartkus, but
14 the difference between that case; and this one, frankly, is
15 the jurisdictional basis. That's a federal securities claim
16 where there will be, presumably, uniformity and a need for
17 uniformity, but here we've got removal on diversity of
18 citizenship.

19 We're looking to New Jersey law as well as the law
20 of the Third Circuit, and I looked at the papers, I
21 appreciate what the issues are. I don't see any need to
22 wait, so I appreciate the argument advanced by the defendant.

23 Let's talk about the merits of the remand.

24 MR. BARTKUS: May I ask one other thing? I apolo-
25 gize.

1 THE COURT: Okay, Mr. Bartkus.

2 MR. BARTKUS: My understanding is that this case
3 is here requested by Judge Norris on a request for an R&R
4 from Your Honor --

5 THE COURT: That's correct.

6 MR. BARTKUS: -- as opposed to an opinion. Thank
7 you.

8 THE COURT: Right. I don't have remand authority
9 of the case. The matter is case dispositive, according to
10 Third Circuit law, Mr. Bartkus, so it would be by an R&R.

11 MR. BARTKUS: Thank you.

12 THE COURT: Okay. Gentlemen, this is not a case
13 about a fifteen-dollar raise, so let's disabuse ourselves
14 about that. Let's talk about what really is an issue here.

15 What is the potential size of the class?

16 MR. VOZZOLO: Well, Your Honor, this is Anthony
17 Vozzolo. We're not necessarily sure of the size of the
18 class. We haven't had an ability to seek discovery yet on
19 the --

20 THE COURT: Well, give me some guess, educated
21 guess.

22 MR. VOZZOLO: It's got to be in the -- you know,
23 to be honest with you, I have no idea. I mean, it's got to
24 be in the thousands, ten thousand, twenty thousand. I mean,
25 we really have no -- no way of determining the actual size of

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1 the class but I would imagine it's fairly large.

2 THE COURT: And I take it your argument is that
3 the removal was untimely, and I think Mr. Bartkus concedes
4 it's untimely unless a decision of the Supreme Court in
5 Exxon/Mobil somehow constitutes a, quote, "paper" for the
6 purpose of the removal statute, correct?

7 MR. VOZZOLO: Correct, Your Honor. I feel, you
8 know, according to 1446, defendant was required to file a
9 removal notice within 30 days. The Exxon decision came out
10 four and a half months after service of process. To obtain
11 the removal remedy defendants are seeking, they claim that
12 Exxon somehow constitutes another order or paper under second
13 paragraph of 1446B.

14 THE COURT: Wait a minute. Mr. Bartkus, you're
15 not -- you're conceding, I take it, aren't you, that but for
16 the Supreme Court opinion this case is unremovable?

17 MR. BARTKUS: We decided not to remove the case at
18 the time, during the initial 30 day window, because the Third
19 Circuit was very clear that in this circuit Zahn (phonetic)
20 controls.

21 THE COURT: I understand -- I understand the argu-
22 ment. I don't want to hear the argument from the defendant
23 yet. All I want is your agreement that but for Exxon/Mobil
24 the case is not removable on a procedural basis because more
25 than 30 days expired.

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1 MR. BARTKUS: On the Zahn basis, but not on other
2 basis, yes.

3 MR. VOZZOLO: Your Honor --

4 THE COURT: Wait a minute.

5 MR. VOZZOLO: I'm sorry.

6 THE COURT: What other basis are there to remove a
7 case beyond 30 days? Just tell me what the basis are.

8 MR. BARTKUS: I just wanted to make clear the Zahn
9 basis we understand to be a nonjurisdictional basis. It
10 doesn't go to 1332.

11 THE COURT: It goes to --

12 MR. BARTKUS: The case would have been --

13 THE COURT: It a procedural --

14 MR. BARTKUS: -- removable under 1332.

15 THE COURT: It's a procedural defect in removal.

16 MR. BARTKUS: Yes.

17 THE COURT: There's no question about that. They
18 made the motion for a remand within the 30 day period to move
19 to remand, so they haven't waived that defense.

20 MR. BARTKUS: Yes.

21 THE COURT: Okay, but you agree with me that but
22 for Zahn -- but for the Exxon/Mobil case, there is a
23 procedural defect in removal here?

24 MR. BARTKUS: Yes.

25 THE COURT: So, if Exxon/Mobil does not constitute

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1 an order or paper under the statute, the case should be
2 remanded?

3 MR. BARTKUS: Correct.

4 THE COURT: Okay. All right.

5 MR. VOZZOLO: Your Honor, I --

6 THE COURT: So, I understand the argument with
7 regard to this.

8 MR. VOZZOLO: Well, I think that is a hurdle that
9 defendants simply can't overcome.

10 THE COURT: Well, the defendant doesn't cite any-
11 thing from the Third Circuit that takes the position that the
12 Supreme Court opinion is control -- is an order of paper,
13 does it?

14 MR. VOZZOLO: No, it -- well, it cites a Doe case
15 but the Doe case is very distinguishable. In the Doe case,
16 which involved federal question jurisdiction as opposed to
17 diversity, the District Court issued a remand order but
18 specifically left in the remand opinion the right to remove
19 if the subsequent case law changed on the federal charter
20 regarding the Red Cross.

21 So, we have a situation where you have identical
22 defendants. The Third Circuit noted that Red Cross was a
23 critical defendant in both cases. You have a District Court
24 remand opinion that specifically allowed the right to seek
25 removal based on subsequent case law.

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1 In this case, Exxon is unrelated. Gillette is not
2 a defendant in Exxon. They are not the same defendants.
3 There was no order issued by any Court which allowed the
4 defendants to seek the re-removal based on subsequent case
5 law. In that hurdle, I think defendant simply can't get over
6 that hurdle.

7 If you -- if Your Honor would like to get into the
8 merits of some of the other arguments, I'll be more than
9 happy to discuss it.

10 THE COURT: We are going to do that. I wanted to
11 talk about this first issue, Counsel.

12 MR. VOZZOLO: Sure.

13 THE COURT: All right. So, I understand your
14 argument with regard to the procedural defect. The defendant
15 relies on the Doe opinion in the Third Circuit. I don't know
16 that it's relevant whether that was a federal question case
17 or not but, certainly, there are distinguishing facts, as
18 you've described them, that the underlying case in the Third
19 Circuit was related or the parties were related to what was
20 before the Supreme Court, and there was also a reservation of
21 removal, whatever effect that might have been.

22 The Third Circuit apparently thought it was
23 sufficient to allow removal to take place, so I understand
24 what your argument is in that one.

25 Let's talk about the two grounds that the

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1 defendant really advances on substantive measures, if you
2 will, to remove. One the injunctive relief, if you will,
3 with regard to what, disgorgement?

4 MR. VOZZOLO: Well --

5 THE COURT: Well, there's disgorgement and there's
6 the injunctive relief.

7 MR. VOZZOLO: There's two arguments defendants are
8 making. One is that the injunctive relief can somehow be
9 viewed from the defendant's point of view, a vantage point
10 which has been rejected by the Third Circuit.

11 As a matter of fact, Mr. Bartkus has written an
12 article for the Law Journal of New Jersey which advocates the
13 opposite position he's actually taking in this case, and that
14 was written in July. I have a copy of the article here. So,
15 he's asking Your Honor --

16 THE COURT: Mr. Bartkus is a very prolific write
17 on federal procedure. I understand.

18 MR. VOZZOLO: So, Mr. Bartkus is arguing that you
19 could look at the -- the either viewpoint, which are
20 basically arguments from other Circuits, despite the Third
21 Circuit holding that you look at it from the vantage point of
22 the plaintiff, so I feel that that argument is simply
23 unwarranted under the present circumstances.

24 Under the strict construction of the remand
25 statute, I think any doubt should be resolved in favor of

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1 remand in favor of the plaintiff, so I think that argument is
2 easily disposed of, given the Third Circuit's, you know,
3 bold --

4 THE COURT: Looking to the viewpoint of the plain-
5 tiff.

6 MR. VOZZOLO: Exactly.

7 THE COURT: All right. Now, that deals with your
8 request for injunctive relief, assuming you're correct. Now,
9 what about disgorgement?

10 MR. VOZZOLO: Well, Your Honor, disgorgement, I
11 think defendants are trying to pick up cases which point to
12 some ambiguous cases around the country.

13 THE COURT: Nothing in the Third Circuit.

14 MR. VOZZOLO: Nothing in the Third Circuit from
15 what I can recall. The gist is plaintiff's aren't seeking
16 some -- some isolated fund, and the majority of the cases
17 that discuss this exception to the Schneider (phonetic) rule
18 involve cases involving a single raise or there's some
19 comment or undivided interest.

20 Here, what plaintiffs are seeking are individual
21 transactions. The disgorgement or the unjust enrichment
22 claims are seeking the profit per each individual
23 transaction. There's no global fund. Defendants weren't
24 defrauded as a group; they were defrauded as individuals, and
25 I'm sure defendants will have quite a bit of statements to

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1 make on the class certification motion on that aspect, but
2 they weren't defrauded as a group. This is not a common
3 undivided interest. Regardless of how this --

4 THE COURT: Which makes class certification very
5 questionable in this case, don't you think, Counsel?

6 MR. VOZZOLO: Well, you know, we'll make those --
7 you know, we'll deal with it at that --

8 THE COURT: I know, I'm just asking in the -- in
9 the event it's here.

10 MR. VOZZOLO: Well, I mean, I think there's a
11 common theme underlying the various advertisements Gillette
12 is util-izing, you know, they make a focal point of the
13 ability of the razor to raise the hair on the face at an
14 angle, make the hair stand up. That common theme is
15 transgressed through the print advertisement, the radio
16 advertisement.

17 THE COURT: But isn't there a reliance issue there
18 then that's going to have to be decided on an individual
19 basis?

20 MR. VOZZOLO: Well --

21 THE COURT: Oh, never mind, this is just academic
22 grumbling. We'll leave that aside for now.

23 All right, so I understand your argument is that
24 the Third Circuit law in this area is rather clear, that you
25 don't look either for the injunctive relief or for

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1 disgorgement by the defendant's viewpoint or through some
2 type of aggregation but, rather, it's got to be determined
3 individually and when you look at things individually, we're
4 not above the amount in controversy.

5 MR. VOZZOLO: No, it's hard to imagine how you
6 transform a \$15 -- although, you know, it's much more compli-
7 cated than simply -- but the maximum relief afforded per
8 individual plaintiff will be nowhere near the jurisdictional
9 amount to satisfy federal question, federal --

10 THE COURT: I think you're correct about that.
11 So, the case is removable only if we somehow can aggregate --

12 MR. VOZZOLO: Exactly.

13 THE COURT: -- the injunctive and the disgorgement
14 remedies being sought and attribute them all to the
15 defendant.

16 MR. VOZZOLO: You hit it right on the head, Your
17 Honor.

18 THE COURT: Okay, I think I understand the issues
19 for the plaintiffs. Okay, Mr. Bartkus, let's talk about
20 Third Circuit law and injunctive relief. Doesn't the Third
21 -- hasn't the Third Circuit spoken clearly on this issue?

22 MR. BARTKUS: The case I look at is the Packard
23 case. I think that says that where the primary relief is not
24 injunctive relief. You can't try to twist a case for damages
25 into an equitable or injunctive case and, therefore, using

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1 the term of injunctive relief change the rule the Third
2 Circuit has about pro rata distribution allocation of damages
3 among all plaintiffs.

4 THE COURT: Yes, but there's nothing to distribute
5 pro rata here. As Counsel says, there's no common fund.

6 MR. BARTKUS: What we have here is a case where,
7 and again, it's different from Packard and other cases that
8 the Third Circuit has -- has addressed. It's much more like
9 the Microsoft case and the diet drug case, and I think
10 there's a case in the Second Circuit that is cited by the
11 Gilson (phonetic) case, by the plaintiffs, I think it's
12 the Breward where there will be no relief to any plaintiff
13 unless there is relief to all.

14 That's -- and that's the situation, for example,
15 in the diet drug case where the Court -- where the plaintiffs
16 asked for a medical monitoring fund and the research
17 necessary to get that fund up and going.

18 THE COURT: Yes, but this is not a medical
19 monitoring case.

20 MR. BARTKUS: It isn't, you're right, Your Honor,
21 but there is a cost that the defendants will need to incur to
22 revive the relief requested by the plaintiff, whether it's
23 one plaintiff or a million plaintiffs in a class. It is
24 possible that the plaintiff here could have sued for
25 injunctive relief as an individual rather than class

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1 representative and, in that case, Gillette would have -- and
2 if they were successful, Gillette would have been required to
3 bear the cost of changing its advertising, which the
4 plaintiff agrees is more than \$75,000 for that plaintiff.
5 The fact that there is --

6 THE COURT: No, there's no question that if we can
7 aggregate here the case is removable, and I don't understand
8 the plaintiff to contest that, isn't that right, gentlemen?

9 MR. VOZZOLO: Your Honor, absolutely. Basically,
10 every position defendants are taking is contrary to the
11 Schneider case.

12 THE COURT: Let's leave that alone.

13 MR. VOZZOLO: Sure.

14 THE COURT: All I asked is a concession --

15 MR. VOZZOLO: No, exactly, I agree --

16 THE COURT: All right.

17 MR. VOZZOLO: -- that what they need to do is
18 aggregate all of the relief that we're requesting.

19 THE COURT: All right, that's what I care about.
20 All right, I understand the argument. This is very simple in
21 the sense either the Third Circuit allows "aggregation" which
22 means measuring things from defendant's point of view or the
23 Third Circuit doesn't. I understand your position, Counsel.

24 MR. BARTKUS: Except in a situation where if
25 there's no relief for one, there's no relief for all, and

1 that's dif-ferent from all the Third Circuit cases that I
2 read. Most -- the clearest one in the Third Circuit is the
3 fund created for the benefit of all the class, which
4 plaintiff could not benefit from unless it established the
5 entire class. That's different from damages.

6 The notion of aggregation is that each plaintiff
7 has a separate injury which must be dealt with individually,
8 and you can't bring all of those together and put them on the
9 plaintiff's -- the representative plaintiff's shoulders.
10 That's artificial, but it's just as artificial to say that
11 a -- an injunctive relief that is only effective if it's
12 effective for all must be pro rata allocated among everybody.

13 THE COURT: But how do you get beyond the language
14 in Packard that says:

15 "In a diversity based class action seeking
16 primarily money damages allowing the amount in
17 controversy to be measured by the defendant's cost
18 would eviscerate Schneider's holding that the
19 claims of class members may not be aggregated in
20 order to meet the jurisdictional threshold."

21 MR. BARTKUS: Because it's the fact that -- we're
22 not talking about individual costs as in Packard to send out
23 notices to the various class members. That's individualized
24 costs for injunctive relief, which is just like damages.
25 Here, we're saying much more like setting up a fund.

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1 Defendant has to establish a program, not individualized as
2 to plaintiffs, but for the entire nation, people who would
3 not be part of the plaintiff class, and it's very different
4 and it's much more like setting up a medical monitoring fund,
5 doing the research necessary to set up a medical monitoring
6 fund.

7 It can't ever be allocated or divided or
8 apportioned per plaintiff. It doesn't change if there's one
9 plaintiff or a million. It's always going to be the same
10 cost, and that's very different from Packard.

11 THE COURT: All right. Anything else from the
12 plaintiff?

13 MR. VOZZOLO: Yes, Your Honor. Basically, what
14 defendants are arguing that this Court should ignore is the
15 clear Third Circuit case law and under the strict
16 construction of the removal statute, that simply is not
17 permissible. They're arguing that you should adopt the
18 various laws around the country but it's fairly
19 distinguishable. It's unlike a medical monitoring fund.

20 What's missing here is Mr. Bartkus is suggesting
21 that you look at it in light of the defendant's point of view
22 and that point of view is simply not permissible in this
23 Circuit. I think the questions are very easily answered.

24 THE COURT: Well, I understand that but the
25 language I quoted says, "In a diversity action where the

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1 plaintiff is seeking primarily monetary relief."

2 MR. VOZZOLO: Well, I --

3 THE COURT: You're not seeking primarily monetary
4 relief, you're seeking equitable relief here, aren't you?

5 MR. VOZZOLO: Well, Your Honor, I don't neces-
6 sarily agree with that. I think we're seeking primarily
7 monetary relief. The injunctive relief sought is fairly
8 simple. They sat -- they refrained from making the -- the
9 message that is deceptive that we allege in the complaint,
10 to simply delete it from their next sales brochures that they
11 distribute to the public.

12 THE COURT: So, that's a cost issue that under the
13 Third Circuit precedent is not something that we can look to
14 from the defendant's point of view.

15 MR. VOZZOLO: Exactly.

16 THE COURT: What about disgorgement?

17 MR. VOZZOLO: Well, disgorgement, I think it's --
18 there's a little bit of overlap in the discussion. The basis
19 of the disgorgement in the -- what it actually is an unjust
20 enrichment claim, and if you look back to the history about
21 unjust enrichment, what you're basically asking the Court to
22 do is to get back the property that the defendants have --
23 have taken.

24 THE COURT: I'm familiar with the claim but isn't
25 it --

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1 MR. VOZZOLO: No, no, what --

2 THE COURT: -- isn't it equitable in nature,
3 disgorgement?

4 MR. VOZZOLO: It is equitable in nature but the --
5 the amount that you're getting is a monetary sum. You're
6 seeking the profits but it equates to a monetary amount. The
7 point I was making is that you're not creating this -- this
8 somehow uncommon, undivided fund.

9 What you're seeking is the disgorgement per each
10 individual transaction. So if you bought two razors, you'd
11 be seeking a profit of those two particular razors as opposed
12 to the named plaintiff seeking disgorgement of the entire --

13 THE COURT: Let me ask you this. If one of these
14 two plaintiffs was bringing this action just on his own
15 behalf and not as a class representative and he got all the
16 relief he wanted, injunctive relief would be the same whether
17 there was a class action or not because the injunction you
18 would be seeking would be to bar the defendant from engaging
19 in misleading advertising, is that right?

20 MR. VOZZOLO: Correct.

21 THE COURT: Okay, but what would -- his
22 disgorgement remedy, I take it, would be limited to what he
23 gets back.

24 MR. VOZZOLO: Yes, and it would be based on his
25 individual purchase, so if he purchased a \$15 razor, there's

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1 a certain amount of profit in that \$15 that he would be
2 seeking. I don't think it's permissible for him to obtain
3 the entire amount that Gillette has made off the sale of the
4 product around the country.

5 THE COURT: All right. Okay, anything else for
6 the defendant?

7 MR. BARTKUS: The disgorgement claim, Your Honor,
8 I think is, based on again the agreement by the plaintiff
9 that it's more than \$75,000. I can't tell you how much it
10 would be because no one has asked, no one has calculated what
11 the profits are --

12 THE COURT: I think we can assume --

13 MR. BARTKUS: -- but we're talking about a very
14 large class.

15 THE COURT: I think we can assume that if I allow
16 aggregation the amount in controversy is satisfied and the
17 defen -- the plaintiff said that already. The issue is
18 whether I allow it or not.

19 MR. BARTKUS: Plaintiff also agrees that if the
20 kind of unjust enrichment profit disgorgement that is New
21 Jersey Law is the same as the unjust enrichment profit
22 disgorgement that was held to be nonattributable -- or
23 attributable and non -- and aggregable in the Microsoft case,
24 then we win.

25 There was, I thought, a major concession. They

1 agreed with exactly the distinction that we were making
2 because that's what Microsoft said. Where, under State law,
3 unjust enrichment remedy of profit disgorgement is not,
4 plaintiff by plaintiff by plaintiff, is not a measure of each
5 plaintiff's damages but rather is some other concept than
6 your -- in the Microsoft case it's not an issue of
7 aggregation or nonaggregation, it is an equitable remedy, it
8 is a full sum. You could call it a common fund. The problem
9 with using that word is that too much sends you back to
10 notions of establishing a common fund for settling of the
11 case or a common fund based on damages.

12 The New Jersey case in the Appellate Division,
13 it's the best case that we know of on that, on this issue,
14 the County of Essex case says in -- in many different ways
15 unjust enrichment profit disgorgement has nothing to do with
16 damages. It has nothing to do with individual plaintiff's
17 loss, it is there to punish the defendant for all the unjust,
18 improper gains it had.

19 Now, in that case, the County of Essex case, it's
20 particularly interesting because there the jury found, if I
21 remember correctly, that there was no loss by the plaintiff.
22 The Court still awarded large unjust enrichment profit dis-
23 gorgement, a full disgorgement as the Court described it,
24 because the nature of profit disgorgement in New Jersey,
25 under New Jersey law, is not item by item, plaintiff by

1 plaintiff lost damages. It's not a damage issue. Over and
2 over again that Court says profit disgorgement is not
3 damages.

4 Now, we haven't researched the point, we haven't
5 been asked to address it, but we originally thought, based on
6 the complaint and the clause, paragraph -- or page 13, that
7 plaintiff was seeking all profits earned by Gillette, whether
8 it's by members of the class or not.

9 Now, we all know that we're governed by the
10 allegations in the complaint and that's what the plaintiff
11 asked for, all profits, not some.

12 Now, in its first moving papers the plaintiff
13 also said we expect that -- to get all profits. They didn't
14 narrow it to only profits that are really the same thing
15 as damages. It's only once they saw some of our cases and
16 they started thinking about it they decided to change their
17 tune.

18 Now, Your Honor, they can't do that.

19 THE COURT: Well, I understand --

20 MR. BARTKUS: They have a fiduciary duty.

21 THE COURT: I understand what their obligations
22 are with regard to pleadings and I understand what they can
23 and cannot do in a brief, so I appreciate the argument, Mr.
24 Bartkus. The -- I appreciate the argument. The question
25 before me in the civil actions is whether these matters

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1 should be remanded to the Superior Court of New Jersey.

2 I indicated before argument began that I reviewed
3 the defendant -- the defendant's alternative motion which is
4 for a stay pending some MDL resolution of this matter and, as
5 I indicated previously, I see no reason for a stay. The
6 issues before me are crystallized. I see nothing before me
7 that calls for some uniformity at a national level to be done
8 by an MDL Court.

9 So, having done that, the request for a stay is
10 denied, and let me proceed to address the remand. I
11 appreciate the arguments, Mr. Bartkus, thank you. Thank you,
12 Mr. Bartkus, I understand the arguments.

13 These matters will filed in the Superior Court of
14 New Jersey on February 10, 2005. In the complaints, class
15 action allegations are made for violations of the New Jersey
16 Consumer Fraud Act and also based on principles of fraud and
17 the inducement and unjust enrichment. The complaints were
18 served on the defendants not later -- on the defendant not
19 later than March 3, 2005.

20 Defendant's petition for removal was filed on July
21 22, 2005, at least four months after service. Plainly, the
22 period to remove began to run at time of service of the
23 complaint.

24 I note in the first instance that diversity of
25 citizenship exists. The question really before me is amount

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1 in controversy.

2 Defendant's substantive argument, if you will, for
3 removal centers on whether or not aggregation of claims is
4 permitted or, as stated in the briefs and the law, whether
5 the amount of controversy should be looked at from the
6 viewpoint of the plaintiff or for the defendant.

7 Plaintiff advances arguments based on what
8 plaintiff says are the plain law of the Third Circuit with
9 regard to aggregation. Defendant argues that given the
10 relief sought, aggregation is appropriate here. I need not
11 address these issues for the simple reason that I am
12 satisfied that there was a procedural defect in removal and
13 that the matter should be remanded.

14 The removal papers are based on the decision of
15 Exxon/Mobil Corporation v. Alapata Services, Inc. (phonetic),
16 125 Supreme Court 2611, decided on June 23, 2005.
17 Defendant's argument is that Exxon/Mobil constituted a
18 sufficient change in the law or the like to constitute an
19 order or other paper within the meaning of the second
20 paragraph of Section 1446B. I disagree.

21 Plaintiff relies on the Doe opinion from the Third
22 Circuit Court of Appeals, Doe v. American Red Cross, 14 F.3d
23 196 (3rd Cir. 1993). The opinion of the Third Circuit in
24 Doe, where a Supreme Court decision was considered to be
25 sufficient to run the removal period again, was premised on a

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1 rather unique situation where the same party was a defendant
2 in both matters, where there were similar factual situations
3 and where the District Court opinion explicitly authorized
4 removal based on subsequent Supreme Court opinion.

5 We have none of those facts here. There is no
6 commonality in facts, there are no commonality in parties and
7 there were certainly no underlying order from the District
8 Court permitting removal.

9 The case law is rather plain and unambiguous that
10 orders or other papers do not encompass Supreme Court
11 opinions. See, for example, Marsani v. Major League
12 Baseball, 79 F.Sup. 2d, 1331-1333, (Middle District of
13 Florida 1999), Johanson v. Employee Benefit Claim, 668 F.
14 Sup. 1294-1296 (District of Minnesota 1987).

15 I'm satisfied that there was a procedural defect
16 in removal. I also note that the arguments advanced on the
17 merits of the removal with regard to aggregation are
18 arguments that could have been invoked and might have been
19 invoked within the original 30 day removal period.

20 I will have the transcript prepared, gentlemen. I
21 will attach a report and recommendation that the matter be
22 remanded to Judge Linares and you can take these matters up
23 with Judge Linares.

24 I'll also consolidate both cases for purposes of
25 the motions to remand.

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1 All right. Thank you, gentlemen.

2 MR. VOZZOLO: Thank you, Your Honor.

3 MR. SOHMER: Thank you.

4 MR. BARTKUS: Thank you.

5 THE COURT: All right. Oh, by the way, the plain-
6 tiff's request for the imposition of costs and the like is
7 denied. I'm not satisfied that there was an unfounded argu-
8 ment here. The plaintiff certain -- the defendant certainly
9 made an argument based on the Exxon case. The defendant's
10 substantive argument certainly had merit with regard to
11 interpretation of the existing Third Circuit precedent on
12 aggregation. There's nothing here so egregious as would
13 warrant an award of fees and costs to the plaintiff.

14 All right, gentlemen, thank you.

15 MR. VOZZOLO: Thank you.

16 MR. SOHMER: Thank you.

17 MR. BARTKUS: Thank you, Your Honor.

18 THE COURT: All right.

19 MR. BARTKUS: Need we do anything else to get the
20 transcript?

21 THE COURT: No, Mr. Bartkus, I will get the tran-
22 script. As soon as I get the transcript, we'll have a report
23 and recommendation put on it, it will be filed electronically
24 and you gentlemen can take it from there.

25 MR. BARTKUS: Thank you, Your Honor.

Certification

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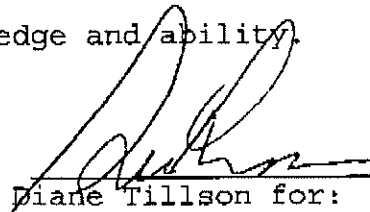
1 THE COURT: All right. Thank you, gentlemen.

2 (Proceedings concluded)

3
4 I, certify that the foregoing is a correct
5 transcript from the electronic sound recording of the
6 proceedings in the above-entitled matter on September 12,
7 2005, to the best of my knowledge and ability.

8
9
10 Date: 10/1/05

11
12 CD - 8:39/9:09
13


Diane Tillson for:
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